LOVELL LAW FIRM, P.C.

Attorney at Law

Lance Lovell

175 N. 27th St., Suite 1206
PO Box 1415
Billings, MT
59103

Phone (406) 256-9300
Facsimile (406) 256-9301

CLIENT TOLL FREE 877-932-1901
EMAIL lovellaw@hotmail.com

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EXHIBIT 8
DATE 1-13-09
HB 190

House of Representatives
Fish, Wildlife and Parks Committee

Re: H.B. 190

Dear Committee Members:

My law firm has been involved in all of the bridge access issues arising in Madison County since 1995, including the pending lawsuit filed by a special interest sportsmen's litigation corporation against Madison County and its individual elected officials. I write in opposition to the bill on the grounds that it would operate to confiscate the private right of riparian access owned by private landowners holding title to private land along some 68,000 miles of small streams flowing over their private land.

H.B. 190 is based on false premises laced in the recitals. It fails to refer or give effect to the recent court judgment entered by the Montana Fifth Judicial District, and needlessly and unconstitutionally ignores many of the provisions of that judgment as well as the 2000 Montana Attorney General Opinion on bridge access.

The recitals and false premises.

1. The authors of this bill have falsely claimed that a significant controversy has existed related to public access to streams. In the past two legislative sessions, legislators on both sides of the political aisle have questioned whether such circumstances actually exist. They have asked for proof of such controversies beyond what the media has reported on the litigation limited to isolated circumstances existing for many decades in Madison County. No credible evidence exists that any bridge access controversies exist any where else inside or outside of Madison County. The bottom line is that special interests such as Trout Unlimited – the national chapter of which Rep. Kendall Van Dyk is the Western Energy Coordinator – have raised a lot of money to pursue their special interest agenda in courts and in this body. The bridge access controversy is a local one that has been used by Trout Unlimited, the Montana Wildlife Federation and their affiliates to raise money for litigation and to manufacture political support for this and other bills. These special interests are not happy with the Fifth Judicial District Court's recent decision and therefore completely ignore it in this bill.

2. The authors of this bill engaged in a sham political process during the interim from the last session, and now falsely claim that H.B. 190 represents a compromise bill. To the contrary, the stakeholders primarily impacted by this legislation – the private landowners abutting the

bridges subject to the litigation – were expressly denied an opportunity to participate in the discussions and drafting of this version of the bill. I wrote Land Tawney, the chairman of the Private Land/Public Wildlife Committee ("PL/PW"), and requested to be put on the agenda to discuss the controversy, the status of the litigation, and the perspective of local taxpayers and local landowners affected by the bill. Mr. Tawney refused to put time on the agenda for me to present this information. I traveled to the June meeting of PL/PW and observed the "compromise" nature of the process. Only officials from FWP and TU were allowed to speak, and they claimed that all stakeholders had been given a fair opportunity to comment on this proposed bill. Sitting to my right in the audience was the former president of the Montana Stockgrowers, who neighbors my client's property and was a co-chairman of the Ruby River Access Task Force that negotiated public fishing access leases at five bridges on the Ruby River under a program supported by then Gov. Racicot. Sitting to my left was the wife of the current president of Montana Stockgrowers, whose husband managed the ranch upstream from my client's property. Donna McDonald, a long time member of PL/PW, noted that I and other landowners directly involved in the litigation and this issue were in the audience. She asked Mr. Tawney to provide us an opportunity to address the issues discussed by FWP and TU officials. Mr. Tawney refused to allow the landowners to participate in the discussion.

Ladies and Gentleman, the bill before you is the same draft that was discussed at the June meeting of PL/PW. It is chiefly designed by TU and its affiliates to expand stream access law and obtain public access rights that neither the Attorney General nor the Fifth Judicial District Court would give them. It is based on a sham process that deliberately excluded good faith participation by actual stakeholders who will suffer the most as a result of the bill. This is a special interest bill, not a compromise bill. Do not allow such false recitals to remain in any version of this bill adopted.

3. Let's also underscore that the recitals fail to reflect the Fifth Judicial District Court's judgment entered this fall. (Again, this is the identical draft circulated by the special interests in June, and omits the court's legal determinations.) I've attached a copy of the court's order. In short, the special interest sportsmen alleged that my client's fences were designed and intended to block public access to the Ruby River, that the public was in fact intimidated and prevented from reaching the river, and that the County violated the law by refusing to have my client's fences removed. Prior to the June PL/PW hearing, the court had twice held that the fences were not illegal encroachments and constituted no clear violation of law. By the end of the litigation in that regard, the court has struck down five separate legal attacks made on these fences by the special interest corporation. Ruling on undisputed facts, the court held that the fences do not violate existing encroachment statutes, the doctrine of custom, or the public trust doctrine, nor do they entitle the sportsmen to writs of either prohibition or mandamus.

4. Perhaps most noteworthy to this committee, the court held that the fences that prompted the 2005 "float-in" and that existed when the special interest corporation filed its third version of the lawsuit were not designed or built to intimidate the public, that the public was not in fact intimidated or blocked from accessing the streams from the bridge right of way, and that all of the plaintiff's claims in this regard were meritless and moot. Tony Schoonen, your committee chairman Van Dyk, and others working for TU and their affiliates can say whatever they want here to the committee or to the media. Indeed, this case has been portrayed as being about sportsmen against a "wealthy out of state landowner" who "locked off the public" to "privatize" the Ruby River. Rep. Van Dyk was quoted by the Associated Press in an article appearing

Sunday saying as much and inviting my client to move to Wyoming. Yet, the false heart of this access movement was unveiled in a deposition of PLAA, by and through Tony Schoonen, who repeatedly admitted under oath that he had "no beef" with the fences, that they were "fine," that the public could easily get over them, and that they were easier to get over than legal barbed wire fences. As such, because the president of PLAA made such damning admissions, the court held that the special interest corporation's claims that Kennedy had tried to privatize the Ruby River by intimidating the public were false, meritless and mooted by his inconsistent admissions made under oath. (I've attached the relevant excerpts from Mr. Schoonen's deposition testimony.)

The recitals of the bill should do justice to the truth and to the actual history of this local controversy. This committee should resist revisionist history being foisted upon this body by special interest groups.

Material aspects of the proposed bill.

1. As mentioned above, H.B. 190 does not attempt to codify either the Attorney General's bridge access opinion issued in 2000, nor the court's order essentially giving effect to certain aspects of the opinion. For example, both the Attorney General and the court recognized that local government has broad discretion and control over county roads, as well as express and implied constitutional powers and duties to do whatever is in the best interests of the county roads in their jurisdiction. H.B. 190 is untenable, because it purports to confer jurisdiction on a state agency that could in turn interfere with local control of county bridges. The bill is likely unconstitutional for this reason alone. Moreover, as a practical "good government" consideration, the Department of Fish, Wildlife and Parks ("FWP") is not directly accountable through local elections to local taxpayers and landowners affected by FWP decisions that could be made at local bridges. Local taxpayers and landowners would have no legitimate recourse against their local elected officials for FWP decisions. And we all know that FWP personnel are not elected or directly accountable to the people. In addition, FWP is singularly ill-suited to be put in such an important position. It lacks the skill sets necessary to adequately consider the private property and other constitutional issues at stake, the public highway safety issues implicated by this proposed conduct, mitigation of the potential risk and legal liability for local governments and landowners impacted by FWP decisions, as well issues relating to use of local aging infrastructure. The better course for the legislature is to stick with time-honored legislation and law developed under the constitution, which entrusts the exclusive control of local bridges with local government.

2. H.B. 190 fails to accurately recite the history of the controversy on the Ruby River or the provisions of the Fifth Judicial District Court's determination, and is not appropriately limited to pedestrian bridge access. Based on the fact that, as the Fifth Judicial Circuit agreed, the special interest corporation's case against my client had been mooted by its own admissions, my client argued that there was no justiciable controversy in that case. The landowners hadn't blocked river access and their fences were perfectly legal. This was such a fundamental revelation that my client moved for summary judgment in large part based on the notion that if the fences and access blocking issues were false and moot, then the rest of the case was moot, too. We urged the court to direct the plaintiff to sue a landowner who actually was blocking public bridge access, and asserted that the court lacked jurisdiction to reach the academic access issue where, as here, the public was already accessing the river and claims to the contrary were false.

The court disagreed and determined that the public could use the dedicated right of ways at Duncan and Lewis bridges to access the Ruby River. All of the court's discussion in this regard was based on pedestrian access; nothing in the order or briefing presented by the parties pertained to the public using the bridge right of ways to drive vehicles to and from the water, to launch or take out watercraft, or to otherwise pack or transport watercraft in and out of the water. The court's order is thus properly viewed as one authorizing pedestrian use of bridge right of ways for access. H.B. 190 is not limited to pedestrian travel.

3. This bill also flies in the face of both the 2000 Attorney General's opinion *and* the district court's order in that it purports to establish a "one-size fits all" rule for all bridges in Montana, regardless of the language contained in the grants and dedications that created the public right of ways and regardless of whether the road was created by prescription. For example, the Attorney General's opinion noted that right of way grants or dedications containing riparian access restrictions or prohibitions were not subject to his opinion. In addition, the Attorney General stated that whether the public may access the river from a bridge built on a prescriptive right of way could only be determined by a trial and proof by clear and convincing evidence of sufficient use during the original prescriptive period. In the Ruby River case, moreover, the court parsed out Seyler Lane, because it is a prescriptive road, and ruled only as to Lewis and Duncan Bridges, where county right of ways exist. The parties will go to trial to determine whether the plaintiff can prove a right of access at Seyler Bridge, as well as to determine the width of the public right of way. H.B. 190 intentionally ignores these critical distinctions, which would result in an unconstitutional taking of private property.

4. To illustrate the takings effect of the proposed bill, let's consider the scenario that will likely play out across Montana in the coming year as the "shovel-ready" infrastructure "stimulus" spending measures are adopted to build new roads and bridges. When the land agents knock on the landowner's door and ask to buy an easement for a bridge, the landowner owns the exclusive right of access to the watercourse at issue. The stream access laws say as much, and both the Legislature and the Court have been very protective of this right, stating repeatedly that the public has no right to cross private property to access water. So the landowner has a number of options here. She can sell this valuable access right to the government, or she can sell the right to build the bridge so people can get over the river, but restrict the easement grant by reserving the right of riparian access or otherwise restricting or prohibiting access. That is a valuable constitutional property right and the public should be informed of it.

H.B. 190 would eliminate that right. It operated to imply a public right of access when a mere bridge right of way is procured, and it handcuffs the owners of private land situated along 68,000 miles of streams flowing through their property in the state.

5. Bear in mind that between 1869 and 1984, Montana property law defined private riparian property rights so as to vest the constitutionally protected right to exclude others from watercourses flowing over private land. These were venerable rights vesting both pre-statehood under territorial, federal and English common law, as well as post-statehood under Montana's original constitution, statutes and case law. Under that law, landowners who granted county road easements were not deemed to have also transferred their valuable riparian right of access. Indeed, no grant for a county road right of way in the history of Montana made between 1889 and 1984 was ever determined by a court to provide legal access to watercourse flowing through private land. Based on that unique history, my client argued in the Ruby River case that the 1910

grant of an easement at Lewis Lane did not include the right of riparian access to the Ruby River. The right should not be implied, either, because the government has the power of the purse and can readily condemn this valuable private property right for a public purpose. This result seems logical inasmuch as today, when land agents come to negotiate bridge right of ways, landowners can restrict their grants to prevent access. The government's only recourse then is to condemn that riparian right of access, which obviously involves payment of just compensation and provision of due process to vindicate the constitutional private property interests at stake. The district court's order did not expressly address my argument, which was effectively denied.

6. It would make more logical sense for the legislature to consider a rule that authorizes public access to streams flowing over private lands when the grant or use creating the bridge right of way in question occurred after 1985. After all, there was no stream access right recognized by the legislature until that year. But even then, the stream access laws now on the books specifically state that they create no easements or rights of access across private land. Accordingly, it is appropriate for those considering proper government conduct and protection of private property rights to inquire: When exactly did the public pay to acquire the riparian right of access to use private land under and next to streams? I respectfully submit that under the U.S. Constitution, which is the supreme law of the land and trumps Montana law in this regard, government simply cannot authorize the public occupation and use of private land without due process and payment of just compensation, because to do so constitutes a bright line confiscation of long vested private property rights.

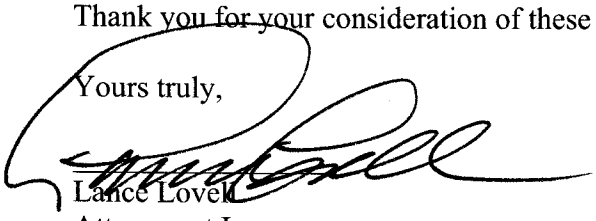
7. Annexed is a revised bill for discussion that attempts to eliminate the mischief intended by special interest groups and instead gives effect to the Attorney General's opinion and the district court's decision. You will note the emphasis on public safety, primarily to address the illegal parking and illegal pedestrian activity that goes hand-in-hand with bridge access. As Madison County knows, my client hired a retired traffic safety engineer who worked for more than 30 years for the Montana Department of Transportation. He examined the bridges on multiple occasions, took radar readings to obtain the range of speed of passing motorists, and took photographs of the June 2005 "float-in" that are now before you. He opined that it is not a matter of "if" someone will be injured or killed by misuse of the bridges in this way; it is a matter of "when." If counties are going to be allowed to use aged infrastructure for public uses beyond their design and construction, then at a minimum the legislature must mandate that counties strictly enforce existing traffic safety codes within the critical approach zone on either side of such bridges.

8. Significant legal liability issues are implicated by bridge access, including tort concepts of negligence and negligence per se, as well as notions of strict liability stemming from government condoned abuse of infrastructure that was neither built nor designed to safely accommodate the use to which it is put. Landowners have been seeking strong legal immunity provisions related to these issues. Under H.B. 190, immunity from liability could only be obtained if a landowner installed a gate. This flies in the face of the district court's order, which flatly held that the fences in question were legal. It is poor public policy to force landowners to modify legal fences, particularly when the fences already are user-friendly and do not block access, before the Legislature extends liability immunity to the landowner. Any landowner who is already maintaining a user-friendly fence, like my client and others on the Ruby River, should not have to watch the government take their private property, install a new gate that might be left open in the future, and then remain subject to possible litigation over the fence.

9. Landowners who already provide legal, user-friendly fences should be provided a strong and separate provision immunizing them from liability for public misuse of the infrastructure. In addition, to the extent that any government entity decides to modify such fences, the government must (1) pay the landowner for the value of the private property; (2) take over exclusive ownership and control of the fence; and (3) be solely liable for anyone injured if cattle or horses get loose because a gate is left open, or someone breaks their neck or puts their eye out trying to climb over the fence. The current language in HB 190 is vague, ambiguous and would not pass constitutional muster in light of recent decisions construing the recreational use immunity statute.

Thank you for your consideration of these issues. Please do not adopt HB 190.

Yours truly,



Lance Lovell
Attorney at Law

Enc. As stated

MONTANA FIFTH JUDICIAL DISTRICT COURT, MADISON COUNTY

PUBLIC LANDS ACCESSS ASSOCIATION INC.,

Petitioners,

vs.

THE BOARD OF THE COUNTY COMMISIONERS OF MADISON COUNTY, STATE OF MONTANA, and C. TED COFFMAN, FRANK G. NELSON and DAVID SCHULZ, constituting members of said Commission; and ROBERT R. ZENKER, in his capacity as the County Attorney of Madison County, State of Montana

Respondents,

and

THE MONTANA STOCKGROWERS ASSOCIATION, HAMILTON RANCHES, INC., and JAMES C. KENNEDY,

Intervenors.

Cause No. DV-29-04-43

ORDER REGARDING MOTIONS FOR SUMMARY JUDGMENT

PROCEDURAL BACKGROUND

Public Lands Access Association, Inc. ("PLAA") filed a second amended complaint alleging breach of public trust (Count One), breach of the doctrine of custom (Count Two), declaratory judgment regarding Seyler Lane (Count Three), declaratory judgment regarding public access to rivers and streams at public bridges, bridge abutments, and rights of way (Count Four), alternative writ of mandamus (Count Five), and attorney fees (Count Six). (June 30, 2006).

Madison County and intervenors Montana Stockgrower's Association ("MSA"), Hamilton Ranches, and James Kennedy responded to the second amended complaint.

Count Two and Five have been dismissed by Court order Feb. 21, 2007 and Nov. 20, 2006.

All parties moved for summary judgment. The summary judgment motions involve Count One, Count Three, Count Four, and Count Six. The parties responded. The parties replied. A hearing was held. The Court denied each party's summary judgment motion regarding Seyler Lane (Count Three).

FACT BACKGROUND

Duncan District Road, Lewis Lane, and Seyler Lane are county roads in Madison County, Montana. Duncan District Road became a county road by the statutory petition process. Lewis Lane is a county road acquired by either dedication or grant. Both Duncan District Road and Lewis Lane are 60 feet wide. Seyler Lane was acquired by prescription.

All three of the county roads cross the Ruby River by way of bridges. Apparently each bridge is less than 60 feet wide.

Fences built by adjacent landowners extend along each county road to the ends of each bridge. At the ends of the bridges the fences narrow from the width between the fences along the roads. The County gave permission to the adjoining landowners to erect the fences to control the landowners' livestock. The fences on Seyler Lane were once electrified. Now all the fences are wooden.

The public has crossed the fences attached to the ends of the bridges to reach the Ruby River from the respective county roads.

ISSUES

The summary judgment motions involve four main issues: (1) Whether the 60 foot wide road rights of way are less wide at the bridges, (2) what use may be made of the rights of way, (3) whether the fences are "encumbrances" within the meaning of Section 7, Chapter 14, Part 21, M.C.A., and (4) whether PLAA is entitled to attorney fees.

ANALYSIS

Summary Judgment

> Summary judgment is only appropriate when no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c). The moving party bears the burden of establishing that no genuine issue of material fact exists. (Citation omitted) Once the moving party meets that burden, then the non-moving party must provide substantial evidence that raises a genuine issue of material fact in order to avoid a grant of summary judgment in favor of the movant. (Citation omitted).

Fisher v. Swift Transportation & J&D Truck Repair, 2008 MT 105, ¶ 12, 342 Mont. 335, ¶ 12, 181 P.3d 601, ¶ 12.

"[T]he non-moving party must set forth *specific facts* and cannot simply rely upon their pleadings, nor upon speculative, fanciful, or conclusory statements." *Thomas v. Hale* (1990), 246 Mont. 64, 67, 802 P.2d 1255, 1257.

Affidavits are considered. Rule 56(c), M.R.Civ.P. "The court must consider the depositions, answers to interrogatories, admissions on file, oral testimony and exhibits presented, and other similar material to determine whether any of the issues are real and genuine." *Brown v. Thornton* (1967), 150 Mont. 150, 155, 432 P.2d 386, 389.

Mootness

Kennedy, MSA, and Hamilton Ranches contend PLAA's claims are moot because the fences do not intimidate the public or impede access to the Ruby River. *See infra.* PLAA contends its claims remain viable because Kennedy, MSA, and Hamilton Ranches still impede the public's claimed right of access to the Ruby River next to the bridges by erecting fences which are encroachments

"A matter is moot when due to an event or happening, the issue has ceased to exist and no longer presents an actual controversy." *Hilands Golf Club v. Ashmore*, 2002 MT 8, ¶ 23, 308 Mont. 111, ¶ 23, 39 P.3d 697, ¶ 23. "Where a court's judgment will not

effectively operate to grant relief, the matter is moot." *Clark v. Roosevelt County*, 2007 MT 44, ¶ 11, 336 Mont. 118, ¶ 11, 154 P.3d 48, ¶ 11 (Citation omitted).

PLAA contends the public is entitled to access to the Ruby River next to the bridges. Kennedy, MSA, and Hamilton Ranches dispute this. PLAA contends the fences are "encroachments" that must be removed. Kennedy, MSA, and Hamilton Ranches dispute this as well. Although the fences apparently do not prevent access to the Ruby River or intimidate the public, fences remain at the respective locations. The issues whether the public has access to the Ruby River on county road rights of way at the bridges and whether fences are "encroachments" still exist and present an actual controversy. The Court's judgment could grant relief on the above issues.

Kennedy, MSA, and Hamilton Ranches' position is unpersuasive.

Standing

Kennedy contends PLAA lacks standing because PLAA admits the fences do not impede or intimidate the public. Therefore, Kennedy contends there is no injury.

The second amended complaint alleges a right to reach the Ruby River by way of county roads, and that Madison County has failed to remove "encroachments." PLAA has alleged a past, present, and threatened injury to its right of access and failure of Madison County to follow the law. PLAA's interest is sufficiently significant that the court should examine its claims. Kennedy's position is unpersuasive.

Justiciable Controversy

Kennedy contends PLAA's claims are nonjusticiable because the fences do not impede or intimidate the public and the public has access to the Ruby River at other designated fishing access sites.

"The existence of a justiciable controversy is a threshold requirement in order for a court to grant relief." *Powder River County v. State*, 312 Mont. 198, 229, 60 P.3d 357, 379 (2002). The test of whether a justiciable controversy exists contains three elements:

1. First, a justifiable controversy requires that parties have existing and genuine, as distinguished from theoretical, rights or interest.
2. Second, the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion.
3. Third, it must be a controversy the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status or legal

> relationships of one or more of the real parties in interest, or lacking these qualities be of such overriding public moment as to constitute the legal equivalent of all of them.

Northfield Ins. Co. v. Mont. Ass'n of Counties, 301 Mont. 472, 475-476, 10 P.3d 813, 816 (2000).

When utilizing this standard it is clear that: (1) the parties' respective rights of access and possession regarding the Duncan District Road, Lewis Lane, and Seyler Lane have created a genuine controversy of the availability of access at other designated sites; (2) the controversy over the scope of those rights is one upon which the judgment of the court may effectively operate; and (3) judicial determination over the controversy can have the effect of a final judgment in law.

Kennedy's position is unpersuasive. The Court should rule on the motions.

Public Trust Doctrine

PLAA contends that the theory of the public trust doctrine entitles the public to access the Ruby River from public rights of way. Kennedy, MSA, and Hamilton Ranches contend otherwise. PLAA's argument is not compelling. However, the Court need not consider this theory. The analysis set out below controls.

Road Abandonment Statute

PLAA contends Section 7-14-2615(3) evidences a legislative intent to preserve the public's right to access the Ruby River from public highway rights of way. Section 7-14-2615(3) involves the abandonment of county roads. Kennedy, MSA, and Hamilton Ranches contend that the abandonment statute is irrelevant. It appears that intervenors may be correct. However, the Court need not consider this theory. The analysis set out below controls.

Stream Access Law

Kennedy, MSA, and Hamilton Ranches contend the public's right to use surface waters does not grant any easement or right "to enter onto or cross private property in order to use such waters for recreational purposes." Section 23-2-301(4), M.C.A. Kennedy, MSA, and Hamilton Ranches contend that allowing access to the Ruby River by the public at bridges would contravene the statute. No one seriously argues that the

public has a right to cross private property. This argument need not be analyzed. Instead the issue the Court must determine is what property is private and what is public.

Statutory Access Sites

Kennedy, MSA, and Hamilton Ranches contend the public has sufficient access to the Ruby River at designated state fishing access sites. Kennedy, MSA, and Hamilton Ranches contend that statutory provisions for such sites would be superfluous if the public is also entitled to reach the Ruby River on the rights of way for Duncan District Road, Lewis Lane, and Seyler Lane.

The fact that the legislature created a mechanism by which the State may acquire other public access across private lands for purposes of fishing does not in any way define the extent and scope of existing rights of way for the roads in question. *See* Sections 87-1-285 and 87-1-286, M.C.A. Kennedy, MSA, and Hamilton Ranches' position is unpersuasive.

Taking of Private Property

The argument advanced by intervenors that their private property will be usurped by the public misses the mark. The first consideration is whether the disputed area is public or private. As set out below, that determination is dispositive.

Stream Bed ownership

Stream bed ownership is not an issue in this case. The issue is whether the disputed area next to the stream is available for public use. Therefore, the Court need not consider any contention regarding stream bed ownership.

Indispensible Parties

Kennedy, MSA, and Hamilton Ranches contend PLAA's claims must be dismissed because indispensible parties were not joined. The contention remains unpersuasive for the reasons stated in the Order of June 11, 2008.

Exhibits

PLAA submitted two exhibits at the summary judgment hearing for the Court's consideration. Kennedy objects. MSA and Hamilton Ranches do not object, but they argue the exhibits have limited applicability to the substantive issues presented. The parties filed supplemental briefs stating their positions.

The exhibits involve the legislative history of House Bill 269. The Court did not rely upon the exhibits. Therefore, the admission of the proposed exhibits is moot.

Issue One – Whether the Width of Right of Way at the Bridges is 60 Feet

PLAA contends the public has the right to reach the Ruby River by using Duncan District Road, Lewis Lane, and Seyler Lane. Madison County does not oppose PLAA's position on this point. Fact finding is necessary regarding Seyler Lane. This analysis and ruling applies only to Duncan District Road and Lewis Lane.

Kennedy disagrees. Kennedy contends that fences attached to bridges terminate the public right of way and separate the right of way from private property owned by the adjacent landowners.

MSA and Hamilton Ranches echo Kennedy's contentions. MSA and Hamilton Ranches contend the width of the rights of way at the respective bridges is not 60 feet. They argue that the right of way is limited to only the width of the bridge. They conclude that the public does not have access to the river at bridges.

Duncan District Road

The parties agree that Duncan District Road is a county road established by petition. Transcript 10:2–11:3 (July 25, 2008). The parties agree that the Duncan District Road right of way is 60 feet. *Id.* It is unrefuted that the public may travel the full width of the 60 foot right of way on Duncan District Road. *Id.* at 75:8-77:15, 131:1-6.

The parties disagree about the width of the Duncan District Road right of way at the bridge.

Section 7-14-2101(2)(a) M.C.A. provides, "'Bridge' includes rights-of-way or other interest in land, abutments, superstructures, piers, and approaches except dirt fills." Section 7-14-2112(1) provides, "The width of all county roads, except bridges, alleys, or lanes, must be 60 feet unless a greater or smaller width is ordered by the board of county commissioners on petition of an interested person." Kennedy, MSA, and Hamilton Ranches rely upon these sections to support their contention that the right of way across the Ruby River on Duncan District Road is less than 60 feet and is thus limited strictly to the width of the bridge.

There is no doubt that the bridge on Duncan District Road is part of the Duncan District Road right of way. *See* Section 7-14-2101(2)(a) and Section 60-1-201(c) (public

highways include county roads); see also *State ex rel. Judith Basin County v. Poland* (1921), 61 Mont. 600, 604, 203 P. 352, 353 ("It is conceded, as it must be, that a complete bridge used by the public is a part of the public highway.") *State ex rel. Furnish v. Mullendore* (1916), 53 Mont. 109, 113-15, 161 P. 949, 951-52 ("a bridge is part and parcel of the highway upon which it is built. . . . If the highways belong to the public, it must follow that anything permanently affixed to them, either in the way of repairs or in the form of completed structures, such as bridges and the like, become a part of them, and as much of public right as the highways themselves."); *State ex rel. Foster v. Ritch* (1914), 49 Mont. 155, 156-57, 140 P. 731 ("A bridge is to be treated as but a portion of a public highway."). Therefore, the only issue to be resolved is the width of the right of way at the location where a bridge exists upon a county road.

Section 7-14-2112(1) provides that bridges may be excepted from the general requirement that county roads shall be 60 feet wide unless otherwise ordered by the board of county commissioners. The statute does not mandate either a greater or lesser width at bridges. It is already demonstrated that a bridge is part of a county road. The cases have held that a bridge encompasses a part of the county road. By definition a part is less than the whole. Therefore, there can be no conclusion that a right of way at a bridge is automatically less than 60 feet wide. In contrast the right of way, of which the bridge is a part, shall be 60 feet wide unless otherwise ordered. No order otherwise has been pointed out to the Court for any portion of the Duncan District Road. Therefore, the right of way for its full length must be 60 feet, including that portion upon which is located the bridge across the Ruby River.

Moreover, it is clear from explicit statutory language that the board of county commissioners could have ordered the right of way to have been more than 60 feet wide. Thus, the analysis set out above demonstrates that the right of way at the bridge could have been greater than 60 feet wide.

For these reasons the argument cannot succeed that a right of way either generally or in this case is limited to the width of the bridge. There is no evidence to the contrary so the Court must conclude that the right of way is 60 feet wide at the bridge.

Lewis Lane

Fences and the bridge on Lewis Lane are situated essentially the same as on Duncan District Road.

Kennedy contends the language of the deed does not grant or intend to grant the public access to the Ruby River. Kennedy contends the deed only grants a 60 foot strip of land for purposes of a county road. His implicit argument is that a county road may not be utilized in the vicinity of water. That argument is unsupported by authority or logic. It is unpersuasive.

The analysis applied to the Duncan District Road applies with equal force to Lewis Lane in determining the width of the right of way at the bridge.

Issue Two – Use of the Right of Way

The public is entitled to use the entire 60 foot width of Duncan District Road, not just the beaten path. See *Butte v. Mikosowitz* (1909), 39 Mont. 350, 357, 102 P. 593, 595-596 (citing *Burrows v. Guest* (Utah 1887), 5 Utah 91, 98, 12 P. 847, 850).

It also has been conceded in this case that the public may utilize and travel upon the full width of the county road right of way.

It is true that *Howard v. Flathead Independent Telephone Co.*, 49 Mont. 197, 141 P. 153 (1914) held that when a "sufficient" portion of the highway is graded or otherwise prepared for use the duty then devolves upon the traveler to keep within that portion prepared for his use. The disputed use in that case involved a lady driving her horse to a buggy and who ran a wheel onto a utility guy wire off the graded portion of the road but within the right of way. The court concluded that she was not entitled to recover damages . Negligence issues and damages are not involved in this case.

Further, *Howard* did not hold that the public was prohibited from using any portion of the right of way.

Moreover, the *Howard* court considered facts in which a "sufficient portion of the right of way" was graded or otherwise prepared for use. The issue here is to determine what constitutes the right of way and whether a sufficient portion has been prepared for use. *Howard* is not helpful.

Other cases have held that the public may travel upon waters of the state between the high water marks. Therefore, where a county road intersects state waters, the portion

of each which is congruent with the other creates two over lapping public rights of way. There has been no law nor cogent argument presented to the contrary. The argument that the public is not authorized to cross private property to reach state waters simply does not address the issue of what property constitutes the public right of way. That argument assumes that the property in question is "private." The argument is not remotely helpful to the analysis. The same reasoning applies to the argument that the Court must consider alleged private ownership of the bed of the stream. That is not an issue in this case. The issue is the width of the county road right of way.

Summary judgment should be awarded to PLAA on Count Four regarding Duncan District Road and Lewis Lane.

Issue Three - Encroachments

PLAA contends that the fences within the highway rights of way at the ends of the bridges across the Ruby River on Duncan District Road, Lewis Lane and Seyler Lane are encroachments, that Madison County has a duty to remove the alleged encroachments, and that Madison County has violated its duty by failing and refusing to remove them.

Madison County, Kennedy, MSA, and Hamilton Ranches contend Madison County did not breach any duty because Madison County has discretionary power to manage county roads and highways. They collectively contend that the fences are not encroachments but devices to manage the best interests of the county roads and road districts.

Section 7-14-2134 provides,

> (1) If any highway is encroached upon by fence, building, or otherwise, the road supervisor or county surveyor of the district must give notice, orally or in writing, requiring the encroachment to be removed from the highway.
> (2) If the encroachment obstructs and prevents the use of the highway for vehicles, the road supervisor or county surveyor must immediately remove the same.
> (3) The board of county commissioners may at any time order the road supervisor or county surveyor to immediately remove any encroachment

Whether the fences at the intersections of the respective county roads and the Ruby River are encroachments is a question of law. The Court's role "is to interpret the meaning of the terms included in a statute, not to insert what has been omitted. Section 1-

2-101, MCA." *In the Matter of the Mental Health of E.T.*, 2008 MT 299, ¶ 22, __Mont.__, ¶ 22, __P.3d__, ¶ 22.

PLAA contends the term "encroachment" means "fence" because the word "fence" is used in Section 7-14-2134(1). The statute recites what must occur when a fence (or other) encroaches upon a highway. It does not define a "fence" as an "encroachment."

"Encroached" and "encroachment" are not defined in the statute. Therefore, the Court must interpret the ordinary meaning of the terms. *See Werre v. David* (1996), 275 Mont. 376, 913 P.2d 625, 631.

PLAA relies on the definition of "encroach" in a *Merriam-Webster Dictionary*. The definition PLAA provides without designating the particular dictionary upon which it relies is:

> 1 : to enter by gradual steps or by stealth into the possessions or rights of another
> 2 : to advance beyond the usual or proper limits"

PLAA's Combined Motion for Partial S.J. Re: Public Access to Rivers and Streams from Public Highways and Br. in Support 12:6-9 (May 19, 2008). The Court referred to *Webster's Ninth Collegiate Dictionary* (1984) which provides an identical definition. *See infra.*

Intervenor Kennedy cites to the 8th Edition of *Black's Law Dictionary* which defines "encroach" as "to gain or intrude unlawfully." The Court has only the 4th Edition of *Black's Law Dictionary* which provides, "An encroachment upon a street or highway is a fixture, such as a wall or fence, which *illegally* intrudes into or invades the highways or encloses a portion of it, diminishing its width or area, but without closing it to public travel." *Black's Law Dictionary* 620 (4th ed., West 1951) (emphasis added). All definitions include an element of illegal activity. The Court must determine whether the fence which intrudes or diminishes width is illegal.

Madison County has the power to "maintain, control, and manage county roads and bridges within the county." Section 7-14-2101(1)(a)(i); *see also* Section 7-14-2103. Duncan District Road, Lewis Lane, and Seyler Lane are county roads and public highways in Madison County. *See* Section 60-1-201(c). Furthermore, Madison County

has the power to, "in its discretion do whatever may be necessary for the best interest of the county roads and the road districts." Section 7-14-2102.

Madison County authorized landowners to erect the fences at the respective locations to control livestock. There is no evidence that controlling livestock is an unreasonable illegal goal. The landowners erected fences in compliance with Madison County's directives. Therefore, the fences are authorized. An authorized fence is not an encroachment. Thus the fences Madison County authorized are not encroachments.

PLAA argues, "A highway is 'encroached' if a private landowner erects a fence 'beyond the usual or proper limit.'" PLAA's Combined Motion for Partial S.J. Re: Public Access to Rivers and Streams form Public Highways and Br. in Support 12:10-11 (May 19, 2008). However, the key words in PLAA's definition are "beyond the *usual* or *proper* limits." (Emphasis added).

"Usual" means "1: accordant with usage, custom, or habit: NORMAL[;] 2: commonly or ordinarily uses[;] 3: found in ordinary practice or in the ordinary course of events: ORDINARY." *Webster's Ninth Collegiate Dictionary* 1299 (1984). "Proper", in this context, means appropriate. See *Black's Law Dictionary* 1381 (4th ed., West 1951) and *Webster's Ninth Collegiate Dictionary* 943 (1984).

PLAA argues that fences tied to the ends of bridges are the ordinary situation in Madison County. This position is manifest in its request for relief to be applied to "all roads in Madison County." PLAA's own arguments demonstrate that the fences about which it complains are usual and ordinary. Therefore, private landowners have not erected fences beyond the usual limit. The fences are proper because they have been authorized in the discretion of Madison County.

PLAA contends the particular encroachment provisions (Section 7-14-2134 through Section 7-14-2136) are paramount to and control the general maintenance provisions (Section 7-14-2101 through Section 7-14-2103). *See* Section 1-2-102, M.C.A. That position may be true if the provisions were inconsistent. However, any fence, authorized or not, must be an encroachment to reach the conclusion advanced by PLAA. The fallacy of that conclusion has been demonstrated.

If *Howard, supra*, has effect upon this case at all, it can be only the implication that it is permissible to place telephone poles and guy wires within the right of way, even

when a user of the road suffers physical damages. When such poles and guy wires are authorized there is no reason to prohibit a fence which has not caused physical damage.

PLAA's complaint also alleges the fences constitute unlawful encroachments designed to block and/or intimidate the public from accessing the Ruby River. Second Amd. Compl. for Declaratory Judm. and Pet. for an Alt. Writ of Mandamus ¶¶ 20-22. PLAA asks the Court to determine as a matter of law that counties may not allow private landowners to erect fences within the public highway right-of-ways which *impede* members of the public from access to the rivers. PLAA's Combined Mot. for P.S.J 2:3-8. However, Tony Schoonen testified for PLAA pursuant to Rule 30(b)(6), M.R.Civ.P. that the fences are not intimidating to the public. Depo. Tony Schoonen 40:6-8 (April 21, 2008). The wooden rail fences are "good enough" and "fine." Depo. Schoonen 44:6-20. PLAA is "satisfied with the wood rail fences." Depo. Schoonen 46:5. Schoonen's testimony concedes that the fences do not impede, block, or intimidate the public from reaching the Ruby River. PLAA's complaint and request for relief is mooted by its own deposition testimony.

PLAA's encroachment theory must fail.

Conclusion

No genuine issues of material fact exist regarding alleged encroachments at the bridges on Duncan District Road, Lewis Lane and Seyler Lane. Madison County, Kennedy, MSA, and Hamilton Ranches are entitled to judgment as a matter of law regarding Count One.

Issue Four: Attorney Fees

Madison County, Kennedy, MSA, and Hamilton Ranches moved for summary judgment regarding PLAA's request for attorney fees (Count 6). PLAA seeks attorney fees as a successful applicant for a writ of *mandamus* and pursuant to the private attorney general doctrine.

Writ of Mandamus

The Court dismissed PLAA's writ of *mandamus* claim. Or. Denying PLAA's Pet. for a Writ of Mandamus (Nov. 20, 2006). Therefore, PLAA was not a successful applicant. Attorney fees cannot be awarded to PLAA based on its unsuccessful

application. Therefore, Madison County, Kennedy, MSA, and Hamilton Ranches are entitled to judgment as a matter of law.

Private Attorney General Doctrine

There are three factors to be considered in awarding attorney's fees based upon the private attorney general doctrine: (1) the strength or societal importance of the public policy vindicated by the litigation; (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff; and (3) the number of people standing to benefit from the decision. *School Trust v. State ex rel. Bd. of Comm'rs*, 296 Mont. 402, 421-422, 989 P.2d 800, 811-812 (1999). "The [private attorney general] Doctrine is normally utilized when the government, for some reason, fails to properly enforce interests which are significant to its citizens." *In re Dearborn Drainage Area* (1989), 240 Mont. 39, 43, 782 P.2d 898, 900.

The Montana Supreme Court also has limited private attorney general fees to "litigation vindicating constitutional interests." *Am. Cancer Soc'y v. State*, 325 Mont. 70, 77, 103 P.3d 1085, 1091 (2003). The Court in that case found a statute ineffectual rather than unconstitutional and reasoned that "without the vindication of a constitutional interest, this case does not warrant private attorney general fees." *Id.* Constitutional issues must be involved before determining whether private attorney general fees are warranted.

PLAA asserts that Madison County violated the PLAA and the public's constitutional right to access the Ruby River. As has been noted above, Madison County, Kennedy, MSA, and Hamilton Ranches have not impeded or intimidated the public to prevent the public from reaching the Ruby River. Therefore, Madison County has not acted unconstitutionally to do so.

Madison County, Kennedy, MSA, and Hamilton Ranches are entitled to judgment as a matter of law regarding Count Six.

NOW THEREFORE, IT IS HEREBY ORDERED that:

1. PLAA's motion for summary judgment on Count Four as it pertains to Duncan District Road and Lewis Lane is granted to the extent that the public may utilize any portion of the 60 foot right of way regardless of the Ruby River intersection with it and subject to lawful management

by Madison County Commissioners. Count Four is dismissed with prejudice as it pertains to any other county road.

2. Madison County, Kennedy, MSA, and Hamilton Ranches' motions for summary judgment regarding Count One are granted to the extent that Count One of PLAA's second amended complaint is dismissed with prejudice.

3. Madison County, Kennedy, MSA, and Hamilton Ranches' motions for summary judgment regarding Count Six are granted to the extent that Count Six of PLAA's second amended complaint is dismissed with prejudice.

4. PLAA's exhibits P-1 and P-2 are not admitted into evidence for summary judgment purposes.

5. The Clerk of Court will please file this Order and distribute a copy to all parties.

Dated: September 30 2008.

LOREN TUCKER DV-29-2004-43
District Judge

Tony Schoonen

MONTANA FIFTH JUDICIAL DISTRICT COURT
MADISON COUNTY

Public Lands Access Association, INC,

vs.

The Board of County Commissioners of Madison County, et al.

Date: April 21, 2008

Reported by:
Yvonne Madsen

CHARLES FISHER COURT REPORTING, INC.
503 East Mendenhall
Bozeman, Montana 59715
Phone: (406) 587-9016
Fax: (406) 586-0926
fisherreporting@imt.net
fishercourtreporting.com

MONTANA FIFTH JUDICIAL DISTRICT COURT

MADISON COUNTY

PUBLIC LANDS ACCESS ASSOCIATION, INC.,

Petitioner,

vs. No. DV-29-04-43

THE BOARD OF COUNTY COMMISSIONERS OF MADISON COUNTY, STATE OF MONTANA, and C. TED COFFMAN, FRANK G. NELSON, and DAVID SCHULZ, constituting members of said Commission,

Respondents.

THE MONTANA STOCKGROWERS ASSOCIATION, and HAMILTON RANCHES, INC., and JAMES C. KENNEDY,

Defendants and Intervenors.

30(b)(6) DEPOSITION UPON ORAL EXAMINATION OF

TONY SCHOONEN

Q. None of your experts have offered any testimony or historic documents about use of Lewis Lane prior to 1947 that I'm aware of.

A. I don't know.

Q. If some offered something in general, that may be the only exception. But unlike Seyler Lane where we've dealt with stagecoach routes and so on, I'm not aware of any expert opinion that indicates that Lewis Lane was established by, under R.S. 2477, for example. Are you?

A. Not right offhand, no.

Q. How about with Duncan Lane, the Duncan Bridge, how was that created?

A. I think it was also a dedicated road.

Q. So today, you admit, don't you, that there are no orange signs or no-trespassing signs in any area that you claim to be the Seyler Lane right-of-way?

A. Correct.

Q. And with respect to the downstream side of Lewis Lane, you admit that there's no orange paint or no-trespassing signs in any area that you claim to be part of the right-of-way; is that correct?

A. That's correct.

Q. And you know that there are wood panels there at the --

A. Seyler Lane.

Q. At Seyler and also at Lewis?

A. Correct.

Q. And are you saying that those are intimidating to the public?

A. Not really, no.

Q. But you prefer those to electric fences, do you not?

A. Definitely.

Q. And the times that you launched your boat, when was the last time you launched a boat on the downstream side of Lewis Lane?

A. Probably before the electric wires went up, whenever that was, 10 years ago, 12 years ago.

Q. It was during Kennedy's ownership of --

A. However, long he's owned that. Whenever the electric wires -- I'm not sure just the exact time, but I'm not that old. I don't like electricity and I didn't --

Q. Now, your complaint says that there are electric wires that still exist in bridge right-of-ways. Where do those exist if they don't where Kennedy owns?

A. I believe they're on the upper Ruby, the report that I had. I've never been up there to determine it for sure.

Q. So let me get this straight. Are you referring to electric fences that are 30 miles away to make your claims about these fences --

A. No.

Q. -- that exist here?

A. No.

Q. Well, are you admitting, then, today for the court that there are no electric fences in the right-of-ways of any of these three bridges?

A. Correct.

Q. So that is not an issue?

A. Not now.

Q. Not now.

MR. GEDDES: The status of fences at the bridges is what they are at this moment in time.

THE WITNESS: Yeah.

(Discussion held off the record.)

MR. GEDDES: It is what it is.

Q. (By Mr. Lovell) So, sir, I think we've established that many of the complaints in the second amended complaint are no longer viable and need to be addressed by the court.

The fences that Kennedy owns in any area that you claim to be a bridge right-of-way are more user friendly than electric fences, is that what you're saying?

A. Correct.

Q. And if you were going to compare those to any previous fences historically that you're aware of, aren't they consistent with what we see at bridges, wood rails?

A. Correct.

Q. So they're no more onerous than what the average sportsman sees at bridges in Madison County or Beaverhead County or elsewhere, are they?

A. If they're a legal fence, then that's fine, right.

Q. And you're admitting that these are legal fences, are you not?

A. I'm not sure. I never did go up to officially measure them or anything.

Q. And your counsel is going to have heartburn by the time this is over, but when you say "legal fence," you're referring to --

A. 1885 law.

Q. 1885 law?

A. Yeah. Then it was updated in 2000 in the legislature and basically kept the same, that the bottom wire should be only 15 inches, the top wire no more than 48 inches, and a five-wire, four or five-wire.

Q. And I don't see any allegation of fact about the dimensions of the first strand, last strand in this lawsuit. Is the corporation saying that's an issue now?

A. No. We refer to it as a legal fence, a legal fence.

Q. And are you saying that that's the maximum size of a legal fence in the state of Montana?

A. According to the code.

Q. According to the code, chain fences are illegal?

A. They didn't ever refer to chain link fences, so --

Q. Okay. Do you know what the cost would be to replace the wood rail fences or remove them?

A. I'm not sure what that would be.

Q. What is the ultimate desire of the corporation with the relief that you're seeking? Do you want the wood rail fences to go all the way

across the river upstream and downstream from the bridge?

A. If that's what it takes to designate a public right-of-way, but it's hard to maintain them that way.

Q. Yes, it is. And I'm asking you, what are you asking the judge to do here? Is that the result that you want?

A. Not to remove the rails. I mean, it's basically just to allow some point of access at a bridge, whether it's a walk-through or a pole fence, rail fence or whatever.

Q. Well --

A. Without any electricity.

Q. So you have that already. You have a pole rail fence. You dragged your boats over it in 2005, right?

A. Uh-huh.

Q. Was that good enough for you?

A. Yeah, fine.

Q. And so you don't have any beef with my client's fences now?

A. No.

Q. You said no, but I think you mean, right, I don't have any problem with those fences?

A. Well, the one at the Lewis Lane Bridge, I do have.

Q. Which part?

A. The lower part, because what happened on that particular --

Q. East or west?

A. Downstream side.

Q. Downstream north?

A. East side. And the fact is that the riprap on that almost makes it impossible to drag a boat down to the river, and as close as the fence.

Q. So it would work better if the County would improve the right-of-way to enhance the ability to get a boat down there? That's what you're saying?

A. That's what I'd like to see. It might not ever happen, but it would be nice.

Q. You're not saying that Jim Kennedy put the river rap --

A. No, no I not saying he did it purposefully. I don't know who did it. But the fence is right up to the bridge so it's real hard between the riprap and the fence coming right into the bridge there, that it's real hard to get a

boat down there. And the other side is all brushy.

Q. The access corporation is essentially satisfied with the wood rail fences?

A. Right.

Q. And that's the most that you would ask the landowner to do; is that correct?

A. That's correct, unless some statute comes up between now and then that improves it, you know.

Q. Well, let's talk about that for a minute. This is the part of the second amended complaint that I don't understand. On one side of the house, the corporation seems to be in tune with the County's need to take care of public safety issues, and it doesn't seem to have a problem with that. And it says that fences are needed, the County, and I'm paraphrasing, but the County has pretty consistently said these fences serve that public trust because we do view them as protecting the public. And I guess there are different safety purposes depending on perspective. And that's an accurate portrayal of where the corporation is; is that right?

MR. GEDDES: I object to the extent it's

vague, ambiguous, compound and doesn't accurately reflect the claims being made by Public Land Access in its complaint.

Q. (By Mr. Lovell) Well, you are the corporation today, and I think you understand what I'm trying to communicate. Out of one part of the corporation, you're not opposed to the County taking, exercising its authority to protect the public safety?

A. That's what the whole purpose is, right.

Q. And, moreover, all the bad things that got you fired up in the first place have been removed, at least to the extent they involve Jim Kennedy and our neighbor, the Hamilton Ranches; is that right?

MR. GEDDES: I object, it assumes evidence not in the record.

Q. (By Mr. Lovell) Well, let me rephrase it this way. Other than orange paint, no-trespassing signs, electric fences and the wood rail fences that you say you have no quarrel with now, what other problems does Kennedy have for you at the bridges, if any? Are you aware of anything?

A. No.

Q. So --

A. If it allows adequate access. And I think, you know, when we're talking about public access, you know, it should be suitable for elderly and young people, too. But I think some of that stuff is already.

Q. Well, Tony, that's an interesting point and we'll mention that. And it goes to the -- this is the fear, this is Pandora's Box for every local government. If there truly is a public right of reasonable and convenient and civil law probably imposes safe, a duty to provide such access at every stream or water body that's subject to the recreational use statutes, then there's a high cost for this, and I'm not clear on who is going to bear that cost. And shouldn't the taxpayer, since they're part of the public that is supposed to be served by the trust, they're a beneficiary and they're a trustee, are they not?

MR. GEDDES: I object, it calls for a legal conclusion.

Q. (By Mr. Lovell) Okay. But the public has the right to elect the people that administer the trust, do they not?

A. That's correct.

Q. And then they have the right as the

beneficiary to extract the highest return from their tax dollars, do they not?

A. Correct.

Q. So here, you've got wood rail fences that you agree cause no problem for access, at least where Kennedy is; is that right?

A. Very little, yes.

Q. And, yet, the corporation feels that disabled persons and the elderly, which include my own father who is 80 and others, and my son who is disabled and in a wheelchair, you feel that the bridges should provide access for those folks that they don't -- the wood rail fences don't provide access for those folks, is that what you're saying?

A. Well, it's difficult.

Q. So if the corporation agrees that the wood rail fence that Kennedy maintains are okay, what are you going to ask, why are you going to ask the court to have them removed?

A. I don't think there needs to be a fence there, period.

Q. You're not a safety expert, right?

A. No.

Q. You'd defer to the safety experts in the

fences.

A. What's the question?

Q. I'm wondering why you didn't get involved back then. Why didn't you sue then?

A. I don't think -- if I can recall the whole thing, there weren't the electric wires on the bridges at that time, if I can recall it correctly.

Q. So is that the only distinction, Tony, is the electric wires that are no longer an issue in the case?

A. I think that's right. That's correct.

Q. And then, were you involved in the requests? Did you help the sportsmen present the facts to the attorney general during the requests for an attorney general's opinion?

A. Correct.

Q. And did you see -- you know Bob Lane, chief counsel for Fish, Wildlife & Parks?

A. Right.

Q. Did you see Mr. Lane's letter that he wrote to Joe Mazurek asking for the attorney general's opinion?

A. At what time?

Q. It was '97. But it's the actual request.

bridge was difficult, the downstream side.

Q. I didn't hear you say that.

A. I said it earlier.

Q. I thought you said riprap.

A. The riprap and the fence were right there, tied right into the bridge on the downstream side. If I didn't say it, I meant to say it.

Q. Okay. So it's good that you clarified it because I don't think that you said it. And is it the existing fence or the previous fence?

A. The previous fence.

Q. Okay. And do you have any problem with the current layout of any of Kennedy's fences?

A. Just that one -- still the riprap and the closeness of the fence still makes it difficult.

Q. At Lewis and that's the east side?

A. The east side or the -- yeah, the east side downstream.

Q. So what you're asking the judge to do, even though access is consistent with the access rights of the past, you want the judge to remove those fences in their entirety through whatever width he determines to be the bridge right-of-way?

A. I wouldn't say remove them, I would just

say maybe some walk-through or something within the right-of-way.

Q. So if you said earlier in your deposition you don't think fences should be there at all, you're not asking the judge to remove the fences now?

A. Well, I mean, that's my personal thing. I'm not going to ask the judge to do anything, that's up to him to determine that.

Q. Well, I'm asking on behalf of the corporation, just what are you asking the judge to do?

A. Just make it a legal fence and a reasonable access.

Q. If the fences were litigated in '95, if they were part of the '97 attorney general's opinion, and then if they weren't even referenced by the attorney general in 2000, why did you wait until 2003 to file a lawsuit, or 2004?

A. Because the county commissioners wouldn't do anything. We wrote several letters complaining about the electric wires. And the electric wires were the basis for the whole thing. They wouldn't do anything. So we went up and saw the county commissioners. They still didn't do anything.

2009 Montana Legislature

UNAPPROVED DRAFT BILL -- Subject to Change Without Notice!

Additional Bill Links PDF (with line numbers)

BILL NO.

INTRODUCED BY _____

(Primary Sponsor)

FOR AN ACT ENTITLED: "AN ACT CONFIRMING THAT PRIVATE FENCES ABUTTING COUNTY BRIDGES ARE NOT ENCROACHMENTS; AMENDING SECTION 7-14-2134, MCA, CLARIFYING THE RIGHT OF PEDESTRIAN ACCESS TO SURFACE WATERS FOR RECREATIONAL USE FROM CERTAIN COUNTY BRIDGES; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

WHEREAS, sportsmen sued Madison County over the County's bridge access policy; and

WHEREAS, the Fifth Montana Judicial District Court determined that private landowner fences abutting county bridges do not constitute encroachments and do not block public pedestrian access to the Ruby River; and

WHEREAS, Counties have traditionally authorized private fences abutting county bridges.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 7-14-2134, MCA, is amended to read:

"7-14-2134. Removal of highway encroachment. (1) Except as provided in subsection (4) below, if any highway is encroached upon by fence, building, or otherwise, the road supervisor or county surveyor of the district must give notice, orally or in writing, requiring the encroachment to be removed from the highway.

(2) If the encroachment obstructs and prevents the use of the highway for vehicles, the road supervisor or county surveyor shall immediately remove the encroachment.

(3) The board of county commissioners may at any time order the road supervisor or county surveyor to immediately remove any encroachment.

(4) This statute does not apply to a fence that is in a county road or bridge right-of-way and that is attached to or abuts a county road bridge edge, guardrail, or abutment if the fence and bridge appurtenances are not on the roadway, as defined in 61-1-101.

NEW SECTION. **Section 2. Access to surface waters by county bridge.** (1) Subject to the counties' powers over county roads and bridges as provided in Title 7, Chapter 14; the provisions of Title 23, Chapter 2 Part 3, and the provisions contained in this section, pedestrians main gain access to surface waters for recreational use by using a public bridge, its right-of-way, and its abutments.

(2) When accessing surface waters pursuant to subsection (1), pedestrians shall stay within the bridge right-of-way and shall have no right to trespass on private land outside of such right of way or above the ordinary high water mark.

(3) Counties shall strictly enforce the public traffic safety regulations contained in Title 61, Chapter 8 at county bridges and within 500 feet of either end of such bridge.

(4) Exceptions.

(a) The provisions of this Section do not apply to use of bridges, their abutments or right of ways for vehicular access to or from surface water, or to the transportation of watercraft to or from surface water.

(b) The provisions of this Section do not apply to county bridges built within prescriptive right of ways.

(c) The provisions of this Section do not apply to any right of way created by grant or dedication containing a restriction or prohibition against such access.

(d) Nothing in this Section shall be construed to require a county to maintain, modify or improve a county bridge, its abutments or right of way to provide reasonably safe pedestrian access to surface waters for recreational use.

(e) Neither counties nor private landowners shall be subject to liability for any bodily injury, death or property damage arising from the existence of a privately owned fence abutting a county bridge or arising from any use of a county bridge, its abutments or right of way for pedestrian access to surface water.

(f) Nothing in this Section shall be construed to preclude a county in any way from restricting or prohibiting pedestrian access to surface water for recreational use from county bridges, abutments or right of ways in response to public safety concerns and/or the public cost of maintaining reasonably safe pedestrian access within the unimproved portion of bridge right of ways.

NEW SECTION. **Section 3. Effective date.** [This act] is effective on passage and approval.

- END -